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IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, TERRY S. HARVILL, EDWARD C. HURLEY, RUTH K. KRETSCHMER and MARY FRANCES SQUIRES, in their official capacities as Commissioners of the Illinois Commerce Commission,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORP.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Sprint Corporation ("Sprint") submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

INTEREST OF SPRINT CORPORATION AS *AMICUS CURIAE*

Sprint, through its subsidiaries, has substantial local and long distance telephone operations throughout the United States. Sprint Communications Company L.P. ("Sprint L.P.") is a "telecommunications carrier" as defined in the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). 47 U.S.C. § 153(44). Sprint L.P. is attempting to gain access to local telephone markets as a competitive local exchange carrier ("CLEC"). Other Sprint subsidiaries are incumbent local exchange carriers ("ILECs") in numerous locations and are generally subject to the Act's pro-competitive requirements. This Court's interpretation of the judicial review provisions of the Act will affect Sprint and other CLECs and ILECs involved in ongoing interconnection proceedings before state commissions around the country.

STATEMENT OF THE CASE

The underlying litigation involved the enforcement and interpretation by the Illinois Commerce Commission of an interconnection agreement between Illinois Bell Telephone Company ("Illinois Bell") and WorldCom Technologies, Inc. ("WorldCom") that the commission approved pursuant to Section 252 of the Act. Illinois Bell filed suit in federal

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[1] Sprint has obtained written consent from all parties to file an *amicus* brief. The consent letters are annexed hereto. No counsel for a party authored the brief in whole or in part and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37(6).

district court, pursuant to Section 252(e)(6) of the Act, naming as defendants the Illinois Commerce Commission and its individual members in their official capacity (collectively, "ICC"). Illinois Bell argued that the ICC's interpretation of the interconnection agreement violated federal law.

The ICC, petitioners in this case, moved to dismiss the complaint, arguing that Section 252(e)(6) of the Act limits federal court jurisdiction to the review of state commission determinations approving or rejecting interconnection agreements between CLECs and ILECs, and does not extend to the review of subsequent decisions enforcing or interpreting the interconnection agreements. The ICC alternatively argued that it is immune from federal court jurisdiction pursuant to the Eleventh Amendment and that its participation in proceedings to arbitrate, approve, and interpret the interconnection agreement did not constitute a waiver of its immunity.

The district court denied the ICC's motion to dismiss, holding that: (i) the ICC was not immune from suit under the Eleventh Amendment; and (ii) the district court had exclusive jurisdiction under Section 252(e)(6) to review the actions of the ICC in interpreting and enforcing interconnection agreements.[2] The ICC appealed to the Seventh Circuit. The court of appeals rejected the ICC's Eleventh Amendment claim based on its prior decision in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir. 1999) ("*MCI-I*"), *modified on rehearing*, 222 F.3d 323 (7th Cir. 2000) ("*MCI-II*"), which held that the ICC waived its immunity from suit in federal court by electing to assume regulatory responsibility under the Act. *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 570 (7th Cir. 1999).

[2] The district court ultimately held that the ICC's interpretation of the interconnection agreement did not violate federal law. Ameritech appealed to the Seventh Circuit, which affirmed the district court's decision on the merits.

The Seventh Circuit also held that federal courts have jurisdiction under Section 252(e)(6) to review whether state commission orders interpreting or enforcing interconnection agreements violate federal law. *Id.* at 570-71.[3]

In their respective briefs opposing the ICC's petition for a writ of *certiorari*, Illinois Bell and WorldCom, respondents in this case, both argued that the ICC's enforcement and interpretation of the interconnection agreement could be challenged in federal court, although they disagreed as to the degree to which interpretation of interconnection agreements falls within Section 252 of the Act. The respondents were in complete agreement that the ICC was not entitled to Eleventh Amendment immunity from federal court jurisdiction under Section 252(e)(6) and that the *Ex parte Young* doctrine allowed federal court actions to proceed against individual commissioners in their official capacity.

This Court granted the petition for *certiorari* to address the following three questions:

- whether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a "determination under [section 252]" and thus reviewable in federal court under 47 U.S.C. § 252(e)(6);
- whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission

[3] The ICC filed a petition for rehearing with the Seventh Circuit. That petition was held in abeyance pending the Seventh Circuit's reconsideration of its Eleventh Amendment ruling in *MCI-I*. The Seventh Circuit subsequently issued a revised opinion in *MCI-II* reaffirming its ruling that state commissions do not have Eleventh Amendment immunity in actions brought under Section 252(e)(6) and also holding that the carriers may proceed against the individual commissioners under the *Ex parte Young* doctrine. It then denied the ICC's petition for rehearing in the instant case.

determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity; and

- whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

Sprint adopts the arguments of WorldCom and intervenor Federal Communications Commission ("FCC") that: (i) a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that expressly provides for federal court review of state commission determinations constitutes a waiver of Eleventh Amendment immunity; and (ii) an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing regulatory functions under the Act can be maintained under the *Ex parte Young* doctrine.[4]

SUMMARY OF ARGUMENT

Sprint's brief addresses a single point not addressed in the parties' briefs: whether a state can exercise regulatory authority under the Act without consenting to judicial review in federal court. This analysis may assist the Court should it hold that: (i) a state commission does not waive its immunity from suit in federal court by voluntarily assuming regulatory responsibility for implementing the Act's requirements pursuant to Section 252; and (ii) actions cannot be maintained against individual commissioners in their official capacity

[4] Sprint does not address whether a state commission's action relating to the enforcement of a previously approved Section 252 interconnection agreement is a "determination under [Section 252]" and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6).

under the *Ex parte Young* doctrine. Such a finding would raise serious due process questions about the remedial scheme prescribed by Congress under the Act and would obligate this Court to look for any reasonable construction of the statutory scheme that avoids a constitutional infirmity.

Sprint believes that a state commission cannot exercise the regulatory authority created by Congress under the Act without consenting to review of its actions in the judicial forum chosen by Congress (*viz.*, the federal district courts). This judicial review obligation is no less a part of the state commission's "responsibility" under the Act than are its other regulatory duties and functions. A state commission thus "fails to act to carry out its responsibility" under the Act, within the meaning of Section 252(e)(5), if the agency refuses to consent to federal court jurisdiction in a Section 252(e)(6) review action. In that event, Section 252(e)(5) mandates that the FCC shall preempt the state commission's regulatory authority and assume responsibility for the matter. Section 252(e)(6), in turn, provides that the FCC's actions upon preemption and any judicial review of them (*i.e.*, under the Hobbs Act) "shall be the exclusive remedies for a State commission's failure to act."

This construction of the statutory provisions is consistent with their plain language, preserves federal court review of the Act's implementation, as intended by Congress, and avoids a constitutional problem. It also respects the sovereignty of the states, by permitting them to choose—based on their own perceived interests—between maintaining immunity from suit in federal court or consenting to such review in order to exercise the regulatory powers offered to them by Congress under the Act.

ARGUMENT

I. THE TELECOMMUNICATIONS ACT OF 1996 CREATES A NEW STATUTORY REGIME OF SHARED FEDERAL AND STATE AUTHORITY.

The Act seeks to transform state-sanctioned local monopolies into fully competitive markets on a national scale. The Act fundamentally restructures local telecommunications markets by prohibiting states from enforcing laws that impede competition and by imposing various duties on ILECs to facilitate market entry. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) ("*IUB I*"). The Act is a valid exercise of Congress' constitutional authority under Article I, Section 8 of the Constitution (the "Commerce Clause") and preempts state regulation of local telecommunications to the full extent provided under the statutory scheme. *Id.* at 378 n.6 (Congress "unquestionably" has taken the regulation of local telecommunications away from the states with regard to those matters addressed by the Act.).

Under the Act, new entrants may seek to compete in the local telecommunications market by reselling an ILEC's existing services, by leasing "unbundled" elements of an ILEC's local network necessary to provide telecommunications services, or by "interconnecting" their own networks with an ILEC's network. *Id.* at 371. The Act provides a process for negotiation and, if necessary, arbitration of the terms and conditions for these arrangements, which are to be incorporated into "interconnection agreements." *Id.* at 373.[5] Each interconnection agreement

[5] When the ILEC is also a Bell Operating Company ("BOC"), the Act provides for an alternative method of competitive entry in cases where the BOC has received no requests for interconnection, so that the BOC can demonstrate compliance with the prerequisites for long distance entry set forth in Section 271 of the Act. The BOC may submit a Statement of Generally Available Terms ("SGAT") for approval by the state commission. A SGAT contains "the terms and conditions that such company

must be reviewed and approved by a regulatory agency (*i.e.*, the FCC or relevant state entity). 47 U.S.C. § 252(e)(1)-(2). The regulatory agency retains authority to enforce the agreement. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part and rev'd in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Congress could have exercised its Commerce Clause powers to preempt the states completely, under Article VI of the Constitution (the "Supremacy Clause"), from participating in this regulatory scheme. Congress instead offered the states a cooperative role in the effort, by authorizing the commission or agency traditionally responsible for local telecommunications regulation within each state ("state commission") to assume responsibility for implementing the Act's requirements. 47 U.S.C. § 252(a)-(b). Where a state commission chooses to assume that responsibility, it must follow the dictates of the Act and the FCC's implementing regulations. *IUB I*, 525 U.S. at 378 n.6 ("This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the line to which they must hew."). Congress also intended for a state commission's exercise of these new federal regulatory powers to be subject to review in federal district court, 47 U.S.C. § 252(e)(6), and expressly prohibited state court review of such actions. *Id.* § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). "[I]f the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *IUB I*, 525 U.S. at 378 n.6.

A state commission's decision to assume regulatory responsibility under this statutory scheme is voluntary.

generally offers within that State to comply with the requirements of [S]ection 251 [of the Act] and the regulations thereunder and the standards applicable under [Section 252]." 47 U.S.C. § 252(f)(1).

Congress did not purport to compel the states to participate against their will. Thus, if a state commission chooses not to carry out its regulatory responsibilities at any stage under the Act, Congress provided for federal preemption through two provisions of the Act:

- *Section 252(e)(5)* states as follows:

  COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section *in any proceeding or other matter* under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5) (emphasis added).

- *Section 252(e)(6)* further provides, in pertinent part, that:

  In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC's] actions shall be the *exclusive* remedies for a State commission's failure to act.

Id. § 252(e)(6) (emphasis added).

II. A STATE COMMISSION'S REFUSAL TO CONSENT TO FEDERAL DISTRICT COURT JURISDICTION TRIGGERS FEDERAL PREEMPTION.

As envisioned by Congress, a state commission plays a critical role when it voluntarily assumes the regulatory responsibilities created under the Act. The state commission is responsible for resolving through arbitration any disputes among the carriers—including the rates, prices, and other

terms governing interconnection agreements. *Id.* § 252(c). The state commission is also responsible for approving and rejecting interconnection agreements based on the criteria set forth in the Act. *Id.* § 252(e)(1)-(2). Unless this Court rules otherwise, the state commission retains responsibility under Section 252 for enforcing the interconnection agreements. Many of the issues raised in the various proceedings are complex, fact-specific, and require the technical expertise of the state commission. *See, e.g., U S W. Communications, Inc. v. Hix*, 986 F. Supp. 13, 16-17 (D. Colo. 1997).

It is untenable that a state commission would have the right to assume the regulatory authority created by Congress under the Act without being amenable to federal judicial review of its discharge of that authority. Indeed, in the majority of Section 252(e)(6) cases to date, federal district courts have found one or more determinations by state commissions to be in violation of the Act or the FCC's implementing rules and have remanded to the state commissions for remediation. *E.g., Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 252 (D. Del. 2000); *AT&T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 122 F. Supp. 2d 1305, 1317 (N.D. Fla. 2000).[6]

Sprint joins the arguments of the respondents that the doctrines of waiver and *Ex parte Young* should apply to permit federal district court review of state commission actions. Were this Court nonetheless to find that state commissions are immune from federal suit under the

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[6] The type of administrative review made by the federal district courts in these Section 252(e)(6) cases is consistent both with the statutory language, which charges the courts with determining "whether the agreement or [SGAT] meets the requirements of section[s] 251 and [252]," and the traditional role of federal courts in reviewing agency action. *See Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.").

Eleventh Amendment, Section 252(e)(4)'s proscription of state court review of state commission actions approving or rejecting interconnection agreements could lead to the untenable result of no judicial review of state commission decisions made pursuant to the Act. In that case, well-established canons of statutory construction would require this Court to provide any reasonable construction of the statutory scheme that avoids such a constitutional problem. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (federal courts are required to give a statute any reasonable construction that would avoid a serious constitutional problem); *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (same).[7] The Court need not strain to satisfy that mandate here.

A. The Plain Language Of Section 252(e)(5) Requires Preemption.

Section 252(e)(5), by its plain language, requires the FCC to preempt a state commission's "*jurisdiction*" if the state commission "*fails to act to carry out its responsibility* under this section *in any proceeding* or other matter *under this section* . . . ." 47 U.S.C. § 252(e)(5) (emphasis added). The plain meaning of these statutory terms supports the conclusion that preemption would be triggered whenever a state commission fails to consent to federal district court review.

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[7] The state petitioners have argued that Section 252(e)(4) does not prevent a state court from reviewing state commission decisions enforcing or interpreting previously approved interconnection agreements. ICC Pet'r Br. at 21. That issue is not presently before the Court. Even so, the plain language of Section 252(e)(4) prevents a state court from reviewing state commission decisions approving or rejecting interconnection agreements. A finding by this Court that state commissions can assert Eleventh Amendment immunity from suit under Section 252(e)(6) would thus render approval–or rejection determinations unreviewable and constitutionally problematic.

The term "*jurisdiction*" means "the legal power or authority to hear and decide cases; the power of executing the laws and administering justice." Webster's New Twentieth Century Dictionary Unabridged 993 (2d ed. 1979) ("Webster's Unabridged").[8] Preemption of a state commission's "jurisdiction" of an interconnection proceeding or matter removes the agency's regulatory authority under the Act and transfers that authority to the FCC.

The terms "*any proceeding . . . under [Section 252]*" are broad and unqualified. They necessarily encompass the federal district court review action contemplated in Section 252(e)(6). *See id.* at 1434 (defining "proceeding" as "legal action [or] the taking of legal action").[9]

The remaining question is whether a state commission's refusal to consent to federal district court review constitutes a "failure" by the state commission "*to carry out its responsibility*" under Section 252. The words "carry out" mean "to bring to a conclusion." Webster's II New Riverside University Dictionary 233 (1988) ("Webster's II"). They connote a process of action, and not simply a decision whether or not "to act." The term "responsibility," in turn, is generally defined as "the condition, quality, fact or instance of being responsible, answerable, accountable, or liable." Webster's Unabridged at 1543.[10] "Responsibility" thus

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[8] *See* Webster's II New Riverside University Dictionary 659 (1988) ("the right or power to interpret and apply the law"); American Heritage Dictionary of the English Language 711 (1981) ("American Heritage") (same).

[9] *See also* Webster's II at 938 ("litigation [or] the act of instituting or conducting litigation"); Black's Law Dictionary 1083 (5th ed. 1979) ("an act which is done by the authority or direction of the court, agency or tribunal").

[10] *See* American Heritage at 1108 ("a thing or person that one is answerable for; a duty, obligation or burden"). *See also* Webster's New Collegiate Dictionary 979 (1981) ("moral, legal or mental account-

connotes not only the authority to act but the corresponding duty to be accountable or answerable for one's actions. The very purpose of the Section 252(e)(6) judicial review proceeding is to determine whether the state commission has acted in accordance with federal law. That judicial review proceeding is as much a part of the process contemplated by Congress under Section 252 as the initiation of negotiations and arbitration. A state commission cannot "carry out" its "responsibility" under the Act without bringing that process to conclusion. Its failure to do so is no different in principle from a failure to complete an arbitration once begun.

The plain meaning of these statutory terms, therefore, fully supports the proposition that a state commission's refusal to be held judicially accountable for its exercise of the regulatory powers created by Congress, in the federal forum chosen by Congress, constitutes a failure by the state commission "to carry out its responsibility" in a "proceeding" under Section 252.

B. The Statutory Context And Scheme Further Support Preemption.

The context in which Congress used these statutory terms further supports preemption. Our system of government requires that an executive agency charged with regulatory authority by a legislature be accountable to the judiciary for the exercise of that authority. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . . ."). This judicial review obligation is no less a part of the agency's "responsibility" than are its other regulatory duties and functions. Congress fashioned the remedial provisions of

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ability"); Black's Law at 1179 ("the state of being answerable for an obligation, and involves judgment, skill, ability and capacity").

Section 252(e)(5) and (e)(6) with these fundamental precepts in mind. The statutory terms used by Congress should be interpreted in context to ensure that meaningful federal judicial review of the Act's implementation is preserved.

Federal preemption is also a proper consequence, within the Act's statutory scheme, for a state commission's refusal to consent to review in federal district court. Congress could have preempted the states completely and assigned responsibility for the Act's implementation solely to the FCC. Instead, Congress offered the states a cooperative role in implementing the Act. The state commission's regulatory authority springs from the Act, but the decision to assume that responsibility is voluntary. *Michigan Bell Tel. Co v. Climax Tel. Co.*, 186 F.3d 726, 732 (6th Cir. 1999). A state commission may choose at the outset to decline Congress' invitation.[11] Alternatively, a state commission may decline to participate—by decision (such as resource allocation) or mere inaction—"in any proceeding or other matter" that arises under the Act, whether it be at the mediation, arbitration, or enforcement stage. In each case and at each stage, the consequence prescribed in Section 252(e)(5) is federal preemption. Section 252(e)(6), in turn, makes preemption the "exclusive" remedy for a state's failure to carry out its regulatory responsibilities.

The same result should apply where a state commission refuses to consent to federal district court review under Section 252(e)(6). Preemption would preserve state sovereignty. Each state could weigh its own interests in either asserting Eleventh Amendment immunity (thereby allowing preemption by the FCC) or accepting federal court review as

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[11] The ICC's argument that its participation in the regulatory scheme is not voluntary because it is obligated under state law to carry out its regulatory duties is unpersuasive. To the extent there is an irreconcilable conflict between the requirements of state law and a provision of the Act, the state law is preempted. *See, e.g., IUB I*, 525 U.S. at 378 n.6.

a condition to exercising the regulatory authority offered by Congress under the Act. *See Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 284 (1906) (states can consent to federal court jurisdiction). *Cf. FERC v. Mississippi*, 456 U.S. 742, 767 (1982) (Congress can enact statutes that establish federal requirements for continued state activity in an otherwise preemptible field.); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (Congress has constitutional authority to enact statutes that set federal minimum standards which a state may either implement itself or else yield to a federally administered regulatory program.). Most state commissions could reasonably be expected to make that determination at the outset of an interconnection proceeding. Where a state commission decides to "opt out" on the basis of sovereign immunity, preemption under Section 252(e)(5) would work in the same manner as where a state commission chooses not to participate in the Act's regulatory regime for other reasons (*e.g.*, resource allocation).

Preemption under Section 252(e)(5) would also ensure federal court review of the Act's implementation, as intended by Congress. Section 252(e)(5) decisions are fully reviewable by federal courts of appeals under the Hobbs Act, 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1). *In re Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, 2001 FCC LEXIS 414, at *11 (¶ 15) (Jan. 19, 2001) ("*Section 252(e)(5) Procedures*") ("We do not believe Congress intended for judicial review of final Commission orders issued pursuant to section 252(e)(5) to deviate from [the Hobbs Act]."). Circuit court review of final FCC orders issued pursuant to Section 252(e)(5) would be "consistent with the Act's goal of uniform interpretation of federal law" and would preserve the Act from constitutional infirmity. *Id.*

Finally, the FCC has taken several steps that have made it more practical for the agency to fulfill the state commissions'

role in cases where preemption is necessary. Recently, the FCC revised and expanded its procedures for proceedings conducted pursuant to Section 252(e)(5). *Id.* at *12 (¶ 16); *In re Procedures Established for Arbitration of Interconnection Agreements between Verizon and AT&T, Cox, and WorldCom*, 16 F.C.C.R. 3957 (2001).[12] These procedures allow for the consolidation of Section 252(e)(5) proceedings "to reduce administrative burdens on the parties and the Commission." *Section 252(e)(5) Procedures*, 2001 FCC LEXIS 414, at *12 (¶ 16). In addition, the FCC has reserved "the option of retaining an outside arbitrator" to conduct the initial arbitration proceedings. *Id.* at *7 (¶ 10). The FCC has thus taken steps to minimize the added burdens and demands that preemption places on the FCC and its staff.

C. The Relevant FCC Regulations Support Preemption.

The FCC's *Local Competition Order*—issued six months after the Act's passage—included "interim procedures" implementing Section 252(e)(5) that addressed matters that were sure to arise during the earliest stages of the new regime. The FCC's original "preemption" regulations thus focused on instances where a state commission failed to respond within a reasonable time to a request for mediation or arbitration or failed to complete an arbitration within the statutory time limits. 47 C.F.R. § 51.801(b). The FCC expressly noted that these regulations were only intended as "minimum, interim procedures [which] will allow the Commission to learn from the initial experiences and gain a better understanding of what types of situations may arise that require Commission action." *In re Implementation of the*

[12] In Sprint's experience, these procedures are similar to the proceedings that many state commissions have utilized in conducting arbitrations pursuant to Section 252, including the use of a status conference, discovery, evidentiary submissions, and an arbitration hearing. *Section 252(e)(5) Procedures*, 2001 FCC LEXIS 414, at *8-*12.

Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15,499, 16,128 (¶ 1284) (1996).

The FCC's subsequent experience has led the agency to expand its interpretation of the circumstances that warrant preemption under Section 252(e)(5). Proceedings involving the Virginia State Corporation Commission (the "Virginia Commission") provide a useful illustration. Two years ago, the FCC declined to preempt the jurisdiction of the Virginia Commission in an interconnection arbitration proceeding, in part on the ground that the Virginia Commission's determination was subject to judicial review under Section 252(e)(6). *Global NAPs S. Inc. Pet. for Preemption of Jurisdiction of the Va. State Corp. Comm'n Regarding Interconnection Dispute with Bell Atl.-Va., Inc.*, 15 F.C.C.R. 23,318, 23,318, 23,327 (¶¶ 1, 20) (1999). Thus, the FCC concluded, the complaining party was "not left without a remedy" by the FCC's refusal to preempt under Section 252(e)(5).

Last year, several new entrants petitioned the Virginia Commission to arbitrate interconnection agreements with an ILEC. The Virginia Commission refused to arbitrate the interconnection agreements out of concern that its participation in the Act's regulatory process would waive Virginia's sovereign immunity. *See In re Petition of WorldCom, Inc. for Preemption of Jurisdiction*, 16 F.C.C.R. 6224 (2001); *In re AT&T Communications of Va., Inc. for Preemption of Jurisdiction*, 16 F.C.C.R. 2326 (2001) (same). This concern stemmed from a federal district court decision holding that the Virginia Commission had waived its immunity by electing to arbitrate interconnection disputes under the Act. *GTE S., Inc. v. Morrison*, No. 3:97CV493, Order at 4-5 (E.D. Va. Nov. 7, 1997). The Virginia Commission reasoned that it had no authority to waive the state's sovereign immunity and thus would "'not take any action in this matter that may subject the Commonwealth to federal suit.'" *Petition of WorldCom, Inc. for Preemption of*

Jurisdiction, 16 F.C.C.R. at 6227 (¶ 4) (citation omitted). Instead, the Virginia Commission offered to arbitrate the interconnection dispute solely pursuant to the requirements of state law.

The FCC held that the Virginia Commission's refusal to arbitrate under Section 252 was a "failure to act." The FCC thus preempted the jurisdiction of the Virginia Commission, pursuant to Section 252(e)(5). As the FCC explained:

> Under the scheme established by the 1996 Act, upon receipt of a section 252(b)(1) arbitration petition, "'the State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement [section 252(c)'s standards for arbitration] upon the parties.'" Section 252(c), in turn, requires the state commission to ensure that its resolution of the outstanding arbitration issues meets "'the requirements of section 251,'" including this Commission's implementing rules as well as the pricing standards set forth in the Act. Thus, by insisting upon arbitration pursuant to state law rather than the requirements of the Act, we find that the Virginia Commission has failed to act to carry out its responsibilities under section 252.

Id. at 6227 (¶ 5) (citations omitted).

On two other occasions, the FCC preempted the Virginia Commission for refusing a petition to enforce and interpret an interconnection agreement. *In re Starpower Communications for Preemption of Jurisdiction*, 15 F.C.C.R. 11,277 (2000); *In re Petition of Cox Va. Telecom for Preemption of Jurisdiction*, 16 F.C.C.R. 2321 (2001). In both matters, a new entrant petitioned the Virginia Commission for an interpretation of its interconnection agreement after the ILEC refused to pay reciprocal compensation for traffic delivered to internet service providers. The Virginia Commission refused to accept either petition and invited the parties to request the FCC to adjudicate the dispute.

In response to the Virginia Commission's invitation, the FCC concluded that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements [are] within the states' 'responsibility' under section 252." *In re Starpower Communications for Preemption of Jurisdiction*, 15 F.C.C.R. at 11,279 (¶ 6). The FCC noted that its existing preemption regulations only addressed a state's failure to act to arbitrate or mediate a dispute, explaining:

> [47 C.F.R. § 51.801(b)] does not consider the Commission's Section 252 responsibilities in the context of a state's "'failure to act'" with respect to its other Section 252 obligations. In adopting those rules, however, the Commission did not consider whether a state commission could "'fail to act'" in the context of a subsequent proceeding to interpret or enforce an existing interconnection agreement. In this proceeding, we apply Section 252(e)(5) for the first time to matters outside the scope of mediation and arbitration.

Id. at 11,279 (¶ 5). The FCC then expanded its interpretation of Section 252(e)(5)'s preemption provision, holding that:

> Because the [Virginia Commission] explicitly declined to take any action with respect to Starpower's petitions . . ., *we are compelled to conclude that the Virginia Commission "'failed to act to carry out its responsibility'" under Section 252.* Accordingly, the Act requires us in these unique circumstances to assume the jurisdiction of the Virginia Commission and resolve the outstanding interconnection disputes.

Id. at 11,280 (¶ 7) (emphasis added).

The FCC's expanded interpretation of Section 252(e)(5) requires preemption whether the state commission's "failure to act" occurs at the outset of an interconnection arbitration proceeding or at the enforcement stage, which may arise months or years after the interconnection agreement has been approved. The federal judicial review proceeding contemplated in Section 252(e)(6) falls in the middle of these two stages of the process. Preemption would thus be appropriate where, as here, a state commission has already conducted arbitration proceedings and approved an interconnection agreement but "explicitly declined" to submit to federal court review. Preemption would preserve the underlying efforts of the carriers and the state commission in obtaining an interconnection agreement, subject to the FCC's review of any disputed terms and conditions for compliance with the Act. It would also ensure that private parties are not left without a judicial remedy due to a state commission's failure to carry out its regulatory responsibilities under Section 252.[13]

Finally, although Sprint believes that the FCC's expanded interpretation of Section 252(e)(5) supports preemption here, any ambiguity on that point would not override this Court's independent obligation to construe the statute in any reasonable manner that avoids a constitutional problem. *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 604-05 (D.C. Cir. 1995) (rejecting FEC's narrow definition of "members" that raised First Amendment problems and adopting instead a broader, plain meaning of "members" that avoided the constitutional problem). That judicial obligation transcends the interpretive authority of the FCC and suspends *Chevron* deference. *See Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991) (within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions); *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (same). *See also Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (*Chevron* deference not afforded to FCC order that created a potential Fifth Amendment problem).

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[13] As a practical matter, it is unlikely that a state commission would proceed to these later stages in future cases without consenting to federal suit, given the prospect of preemption under Section 252(e)(5).

CONCLUSION

For the foregoing reasons, Sprint respectfully requests that should this Court conclude that a state commission may properly assert Eleventh Amendment immunity, the proper remedy is for the FCC to preempt the proceedings pursuant to Section 252(e)(5).

Respectfully submitted,

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